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In Reply Refer to:

EPA File No. 03R-04-R2

Partnership for Onondaga Creek
c/o Alma L. Lowry
Visiting Professor of Law/Director
Public Interest Law Firm
Office of Clinical Legal Education
Syracuse University College of Law
P.O. Box 6543
Syracuse, New York 13217-6543

Re: Dismissal of Administrative Complaint 3R-04-R2 (Midland Avenue Regional Treatment Facility, Syracuse, New York)

Dear Professor Lowry:

This letter concerns the April 9, 2004, administrative complaint that the Public Interest Law Firm (PILF) filed with the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) on behalf of the Partnership for Onondaga Creek (POC) about the Midland Avenue Regional Treatment Facility (RTF) in Syracuse, New York. The complaint alleged that Onondaga County (County) and the New York State Department of Environmental Conservation (NYSDEC) had violated Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000d *et seq.*) (Title VI) and EPA's regulations implementing Title VI (40 C.F.R. Part 7) by adopting and approving the Midland Avenue RTF in December 2003. According to the complaint, the Midland Avenue RTF would be located in, and have an adverse impact on, a predominantly African-American neighborhood. As explained below, OCR is dismissing the complaint because EPA has concluded that the Midland Avenue RTF will not have a significant adverse impact.

Complaint Summary

On April 9, 2004, POC filed an administrative complaint under Title VI and 40 C.F.R. Part 7 asserting two allegations. First, the complaint alleged that Onondaga County and NYSDEC had "engaged in a continuing pattern of discriminatory conduct related to the failure to provide adequate and meaningful public participation opportunities to the predominately African-American residents of the Midland Avenue community regarding the Midland Avenue RTF."

Partnership for Onondaga Creek Title VI Complaint, OCR Case Number 03R-04-R2, received April 9, 2004. Additionally, the complaint alleged that “the County’s proposal, and the NYSDEC approval, of the construction and operation of the Midland Avenue RTF will have adverse disparate impacts upon the predominately African-American residents of the Midland Avenue community.” *Id.*

The first allegation was rejected as untimely. Letter from Karen Higginbotham, Director, Office of Civil Rights, U.S. EPA, to Partnership for Onondaga Creek, re: Partial Acceptance/Partial Rejection at 2 (Sept. 20, 2004). Pursuant to EPA’s Title VI regulations, complaints must be filed within 180 days of the alleged discriminatory act. 40 C.F.R. § 7.120 (b)(2). Although POC’s April 9, 2004, complaint described a series of events related to the alleged failure to provide adequate and meaningful public participation, it did not describe an alleged discriminatory act by either the County or NYSDEC that occurred within 180 days of the date that the complaint was filed with EPA. *See generally*, Letter from Karen Higginbotham, Director, OCR (Sept. 20, 2004). Accordingly, by letter dated July 14, 2004, OCR asked POC to identify an alleged discriminatory act taken by the County within 180 days of the filing of the complaint. 40 C.F.R. § 7.120 (b)(2).

By letter dated July 30, 2004, POC alleged that the County refused, in a March 15, 2004, letter, to provide a member of the public with information about the proposed or planned alignment for certain sewer pipes. Letter from Alma Lowry, Visiting Assistant Professor of Law, Director/Public Interest Law Firm (July 30, 2004). In its March letter, however, the County did not refuse to provide information; rather, it explained that it did not have the information that was requested. *Id.* OCR therefore concluded that the County’s March 15, 2004, letter did not constitute an “alleged incident of failure to provide adequate and meaningful public participation,” and rejected the public participation allegation because POC had not identified an alleged discriminatory act related to public participation that occurred within 180 days of the filing of the complaint to support its allegation of a continuing pattern of discrimination in public participation. *Id.*

The second allegation was accepted for investigation on September 20, 2004. Letter from Karen Higginbotham, Director, OCR, at 2 (Sept. 20, 2004). Specifically, the allegation states that the County and NYSDEC violated EPA’s regulations at 40 C.F.R. Part 7 by approving an Engineering Design Report and Midland Avenue RTF and Conveyances Facility Plan. *Id.* Additionally, POC alleges that the County’s proposal and NYSDEC’s approval will allow construction and operation of the Midland Avenue RTF and, therefore, result in a variety of adverse disparate impacts on the African-American residents of the Midland Avenue community. *Id.*

Statement of OCR’s Authority to Investigate

Section 601 of Title VI prohibits discrimination based on race, color, or national origin under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. This

section prohibits intentional discrimination. *See Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607-08 (1983). In addition, Title VI "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance "to effectuate the provisions of [Title VI] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1.

EPA's Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, a recipient of EPA financial assistance may not intentionally discriminate or use policies or practices that have a discriminatory effect based on race, color, or national origin. As provided at 40 C.F.R. § 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency.

In determining whether a recipient's procedures or practices have had a disparate impact on a protected group, OCR will begin its analysis by determining whether the recipient utilized a facially neutral procedure or practice that may have a disproportionate impact on a protected group. *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston*, 997 F.2d at 1407 (citing *Georgia State Conf.*, 775 F.2d at 1417). In addition, OCR will determine whether the alleged impact on that group is significantly adverse. *NAACP v. Medical Center, Inc.*, 657 F.2d 1332 (3d Cir. 1981); *cf. Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-57 (1989) (Title VII case); see *Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1980). If OCR cannot establish the *prima facie* elements of a disparate-impact claim, then the Agency must make a finding of no violation, and dismiss the complaint. 40 C.F.R. § 7.120(g).

Description of OCR's Investigation

The U.S. Department of Justice (DOJ) has published guidance on procedures for investigating complaints alleging violations of Title VI and Title VI implementing regulations. *See*, INVESTIGATION PROCEDURES MANUAL FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS ALLEGING VIOLATIONS OF TITLE VI AND OTHER NONDISCRIMINATION STATUTES (Sept. 1998). The information and data collected, and the approach developed, depends on the nature and complexity of the issues involved in the case. DOJ Manual at 8-9, 61, 142. Evidence gathered must be relevant, material, and reliable, and may be documentary or testimonial, or direct, circumstantial, comparative, or statistical. *Id.* at 79-87, 97-98. Investigations do not necessarily involve on-site visits. *Id.* at 113. On-site investigations are generally conducted only when necessary to gather relevant and material information that cannot be obtained by other means. *Id.* at 113-114. Interviews are conducted when necessary to obtain specific information that will refute or support the allegations in the complaint. *Id.* at 102, 117-119.

When developing the investigation plan, OCR determined that an on-site investigation and interviews were not necessary because the available documentation satisfactorily addressed the issues raised in the complaint. Accordingly, this investigation was conducted by reviewing documents provided by the complainants, recipients, and EPA Region 2. During the course of the investigation, OCR visited the EPA Region 2 office to review all primary and supporting

documentation in the administrative record regarding the Midland Avenue RTF. While at the regional office, OCR reviewed staff files for information pertaining to the analysis and final drafting of the Environmental Assessment. OCR has principally relied on a review of the unusually extensive and complete record of the development and approval of the Syracuse combined sewer overflow (CSO) abatement program, which includes the Midland Avenue RTF.

Factual Background

Initial siting studies for the Midland Avenue RTF were conducted by Onondaga County as part of a state- and federally-sponsored facilities planning study for the control and abatement of CSOs in the late 1970s. ALTERNATIVE SITE EVALUATION OVERVIEW DOCUMENT (Nov. 1999) (ASE) at 2-1. A recommended CSO abatement master plan for the City of Syracuse metropolitan service area was presented in a report entitled Combined Sewer Overflow Abatement Program in June 1979. *Id.* The current site for the Midland Avenue RTF was one of six sites selected for regional treatment facilities. *Id.* The site was selected “due to restrictions in the County’s existing Main Interceptor Sewer (MIS) upstream of the Midland site which did not allow large quantities of upstream flows to enter the MIS,” and because it was “at the general confluence of three major interceptor sewers in the County’s combined sewer system.” *Id.* at 2-1 - 2-2. Three public meetings were held in June and August 1979 on the CSO master plan, and two public hearings, one in August 1979 (which included a preliminary architectural elevation for the Midland Avenue RTF) and one in January 1983. *Id.* at 2-3.

In 1988, the Atlantic States Legal Foundation (ASLF) filed a lawsuit against Onondaga County alleging that the City of Syracuse’s sewer system (which was under the control of the County) did not comply with the Federal Clean Water Act because the sewer system discharged mixed storm water and untreated sewage during major storms (CSOs). 2000 U.S. Dist. LEXIS 12511 at *2; AMENDED CONSENT JUDGEMENT, *Atlantic States Legal Foundation v. Onondaga County Dept. of Drainage and Sanitation*, Docket No. 88-CV-0066 (N.D. N.Y. Jan. 20, 1998) at 1-2.

In February 1989, ASLF, NYSDEC, and Onondaga County reached a settlement and entered into a consent judgment “obligating the County to, *inter alia*, develop a plan (‘Municipal Compliance Plan’ or ‘MCP’) that would bring the County’s effluent discharges from Metro [the County’s Metropolitan Sewage Treatment Plant] and the CSOs into compliance with the States’ effluent limitations and water quality standards, and implement such plan.” ACJ at 2; 2000 U.S. Dist. LEXIS 12511 at *2-*3.

In January 1996, the County issued a Municipal Compliance Plan, developed in consultation with NYSDEC and EPA, that included the original Midland Avenue RTF site. ASE, at 2-3; ACJ, at 3; MIDLAND AVENUE REGIONAL TREATMENT FACILITY AND CONVEYANCES FACILITIES PLAN (Feb. 1999), at 1-1. ASLF and NYSDEC concluded, however, that the County’s Municipal Compliance Plan did not satisfy the requirements of the 1989 consent judgment and, in September 1997, entered into a settlement agreement with the County “that

would establish a framework for the approval and timely implementation of the various upgrades and other measures that are needed to bring the County's effluent discharges from Metro and the CSOs into compliance with the State's effluent limitations and water quality standards." ACJ, at 4.

The Midland Avenue RTF is one of a number of improvements to the storm and sanitary sewer system in the City of Syracuse that are being constructed pursuant to the ACJ issued by the Federal District Court for the Northern District of New York in January 1998. AMENDED CONSENT JUDGEMENT, *Atlantic States Legal Foundation v. Onondaga County Dep't of Drainage and Sanitation*, Docket No. 88-CV-0066 (N.D.N.Y. Jan. 20, 1998). The ACJ replaced the consent judgment issued by the court in February 1989. *Id.*, at 2, 6; *ASLF v. EPA*, 2000 U.S. Dist. LEXIS 12511, at *2-*3. The ACJ described a number of specific projects that Onondaga County was required to construct and established a construction schedule. Among the "Major CSO Projects" in the ACJ were the "Midland Avenue Conveyances Project" and the "Midland Avenue Regional Treatment Facility ('RTF')." ACJ, APPENDIX B: CSO CONSTRUCTION MILESTONE COMPLIANCE SCHEDULE. The ACJ described the Midland Avenue RTF in detail and specified the location and type of facility. *Ibid.* All of the work that the ACJ required the County to do was subject to review and approval by NYSDEC "prior to the initiation of such work." *Id.*, at 15.

In February 1999, the County submitted a facilities plan for the Midland Avenue RTF to NYSDEC. FEB. 1999 FACILITIES PLAN.

In March 1999, the County held a public hearing on the Midland Avenue RTF based on an Environmental Information Document (EID) that the County had submitted to EPA in November 1998 to use in preparing an environmental assessment (EA) required by the National Environmental Policy Act (NEPA) (42 U.S.C.A. § 4321 *et seq.*). NOTICE OF PUBLIC HEARING, *Proposed Midland Avenue Regional Treatment Facility and Conveyances Project (part of the Amended Consent Judgment concerning Onondaga Lake)* (undated); TRANSCRIPT, *In the Matter of Midland Avenue Sewer Project* (March 23, 1999); *Environmental Information Document: Midland CSO Project* (Nov. 1998). Based on the EID and other documents, EPA issued a preliminary EA of, and Finding of No Significant Impact (FNSI) for, the Midland Avenue RTF in July 1999. ENVIRONMENTAL ASSESSMENT: MIDLAND AVENUE [CSO] ABATEMENT PROJECT, Project # XP992581-01-1 (July 16, 1999); PUBLIC NOTICE (July 16, 1999). After taking public comment, EPA issued a final EA/FNSI and a Response-to-Comments (RtC) in December 1999. RESPONSE TO COMMENTS ON THE MIDLAND AVENUE COMBINED SEWER OVERFLOW ABATEMENT PROJECT FNSI/EA (Dec. 23, 1999).

Legal challenges to EPA's FNSI and EA by the ASLF, Syracuse United Neighbors (SUN), and others (including individuals associated with POC) were rejected by the Federal district court in August 2000 and by the Federal Second Circuit Court of Appeals in July 2001. *Atlantic States Legal Foundation, Inc., v. Browner*, 2000 WL 1234659 (S.D. N.Y. Aug. 31, 2000); *aff'd*, *Atlantic States Legal Foundation, Inc., v. Whitman*, 14 Fed.Appx. 76, 2001 WL

792525 (2d Cir. July 10, 2001). In November 2002, the Federal district court issued an order enforcing County condemnation of City property for construction of the RTF. *Atlantic States legal Foundation, Inc., v. The Onondaga County Department of Drainage and Sanitation*, 233 F. Supp. 2d 335 (N.D.N.Y. Nov. 26, 2002).

In September 2001, the County submitted an updated facilities plan to NYSDEC. 2003 FACILITIES PLAN at 1-1; MIDLAND AVENUE [RTF] AND CONVEYANCES FACILITIES PLAN UPDATE WITH FEBRUARY 1999 FACILITIES PLAN (Sept. 2001). The updated 2001 facilities plan “principally included updated service area overflow information and an updated project phasing/implementation schedule, without any major changes to the location or design of the Midland Avenue RTF. 2003 FACILITIES PLAN at 1-1.

The County submitted an amended facilities plan and a revised engineering design report to NYSDEC in June 2003. MIDLAND AVENUE [RTF] AND CONVEYANCES FACILITIES PLAN AMENDMENT (June 2003); MIDLAND AVENUE [RTF] AND CONVEYANCES PHASE TWO PROJECT ENGINEERING REPORT AMENDMENT (June 2003). The revised engineering design report incorporat[ed] changes to the Phase II plan reflecting location of the RTF and underground disinfection tank principally on Cental New York Regional Transportation Authority property [newly acquired by Onondaga County through eminent domain] ... and location of a 2.5 mg underground storage tank on former Syracuse urban Renewal Agency and City of Syracuse property now owned by Onondaga County. LETTER from Michael Cunningham, Director, Onondaga Lake Improvement Project, to Steven Eidt, Regional Water Engineer, NYS Dept. of Env'tl. Conservation Re: *Revised Midland Engineering Design Report Resubmittal* (June 15, 2003). The amendment reduced the size of the Midland Avenue RTF and moved it farther into an industrial area and away from a residential area. *Id.* The revised engineering report was approved by NYSDEC in December 2003. LETTER from Mark Sanza, Associate Counsel, to Michael Mattheisen, U.S. EPA, Re: *Matter of Midland Avenue RTF* (Sept. 20, 2004).

Finding of No Significant Adverse Impact

In its July 1999 preliminary EA, EPA's Region 2 Office stated that its “decision is based on a careful review of the environmental information document, facility plan, and other information.” The Region went on to state that their “environmental review of this project indicates that no significant adverse environmental impacts will result from the proposed action.” The EA/FNSI approved the location of the RTF and concluded that any potential adverse effects on the community surrounding the RTF were temporary and/or would be offset by the County's measures to mitigate the environmental impacts and by the overall environmental benefits that the RTF would provide. EA at 10-11.

EPA took public comment on the EA/FNSI and issued a final EA/FNSI and a Response-to-Comments (RtC) in December 1999. RESPONSE TO COMMENTS ON THE MIDLAND AVENUE COMBINED SEWER OVERFLOW ABATEMENT PROJECT FNSI/EA (Dec. 23, 1999). The only comments received from private parties were from ASLF and SUN. *Id.* at 11.

In January 2004, EPA re-evaluated the Midland Avenue RTF based on changes to the project as described in the amended facilities plan issued by Onondaga County in June 2003. Re-evaluation of Midland Avenue RTF FNSI/EA (Jan. 15, 2004). The changes, which were "intended to further minimize the project's impact," added CSO storage capacity by means of a 2.5 million gallon underground storage tank, reduced the building size from 30,000 to 24,000 square feet, increased the distance from the nearest residence to the building and the underground disinfection tank from 90 to 250 feet, reduced the number of vortex units from 3 to 2, reduced the number of pumps from 5 to 3, and reduced the frequency of operation from 50 times per year to 9 times per year. *Id.* (The project now consists of a 2.5 million gallon underground storage tank, an above-ground building housing two vortex liquid/solids separator units and associated pumping, odor control, ventilation and control equipment, an underground disinfection tank, and about 1,380 linear feet of sewer pipeline. *Id.*) EPA Region 2, accordingly, re-affirmed its finding of no significant environmental impact under NEPA.

Pursuant to EPA's regulations for implementing NEPA (40 CFR Part 6), the project has been re-evaluated to determine whether it or its associated environmental conditions have changed significantly since issuance of the FNSI/EA. Based on our re-evaluation, we have determine that neither the project nor its associated environmental conditions have changed significantly since issuance of the aforementioned FNSI/EA and its associated Response to Comments. Accordingly, we believe that no significant adverse environmental impact will result from the construction and operation of this project. This project complies with the EPA's regulation for implementing NEPA. *Id.*

Conclusion

Based on the foregoing, OCR concludes that the location and design of the Midland Avenue RTF will not have a significant adverse impact and, therefore, OCR does not find a *prima facie* case of discriminatory effect on the surrounding neighborhood. The County and NYSDEC utilized a facially neutral process in planning and approving the RTF. In addition, any potential impacts on the African-American community surrounding the RTF are not significant, are mitigated by the County's efforts to minimize environmental impacts, or are offset by the benefits that the RTF will provide to the community. Accordingly, neither NYSDEC nor Onondaga County have violated Title VI or EPA's Title VI regulations with respect to the adopting and approving of the Midland Avenue RTF. The administrative complaint that PILF filed on POC's behalf is, therefore, dismissed.

If you have any questions, please contact Yasmin Yorker, Assistant Director of the OCR External Compliance Program, at (202) 343-9682.

Sincerely,


Karen D. Higginbotham
Director

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